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No. 01-1080

# In the Supreme Court of the United States

TRANS UNION LLC, PETITIONER

*v.*

FEDERAL TRADE COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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## QUESTION PRESENTED

Whether the application of the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 *et seq.*, to a consumer reporting agency's sale of "target-marketing lists" for purposes not authorized by the FCRA violates the First Amendment.

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**BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION**

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 245 F.3d 809. The court of appeals' opinion on rehearing (Pet. App. 16a-23a) is reported at 267 F.3d 1138. The decision of the Federal Trade Commission (FTC or Commission) is not yet reported, but is available at 2000 WL 257766. The decision of the administrative law judge (ALJ) is unreported.[1]

[1] Petitioner has reprinted excerpts of the FTC's decision at Pet. App. 25a-64a. The decision is reproduced at C.A. App. A0731-A0789, with additional material under seal reproduced at C.A. App. A3295-A3353. Petitioner has also reprinted excerpts of the decision of the ALJ at Pet. App. 65a-67a. The decision is reproduced at C.A. App. A0460-A0560, with additional material filed under seal reproduced at C.A. App. A3027-A3127. For the

A prior decision of the Federal Trade Commission in this case is reported at 118 F.T.C. 821. A prior opinion of the court of appeals, reversing that FTC decision and remanding for further proceedings, is reported at 81 F.3d 228.

## JURISDICTION

The judgment of the court of appeals was entered on April 13, 2001. A petition for rehearing and rehearing en banc was denied on October 23, 2001. Pet. App. 24a. The petition for a writ of certiorari was filed on January 18, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner Trans Union is a consumer reporting agency (sometimes referred to as a credit bureau). It maintains a database of detailed credit-related information (CRONUS) on almost every adult in the United States. That database includes information about each listed individual's employment, credit, and payment patterns. See C.A. App. A0738-A0743.

Petitioner uses the CRONUS database to generate consumer reports containing consumer credit information (sometimes referred to as credit reports), which it sells to subscribers. Petitioner has also used CRONUS to generate and sell "target-marketing lists" to entities that used those lists for solicitation purposes. Target-marketing lists themselves consist of only names and addresses of selected consumers, but because of the way in which they are generated, they effectively communicate much more information to the purchaser of

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convenience of the Court, we are lodging with the Clerk copies of the decisions of the FTC and ALJ, as reproduced in the public version of the appendix filed in the court of appeals.



the lists. Petitioner's list purchasers request target-marketing lists of individuals that meet various credit-related criteria in petitioner's database. Thus, when petitioner sells a particular target-marketing list to a list purchaser, it communicates to the list purchaser that every named consumer meets each of the criteria selected by the list purchaser—for example, that each listed consumer has at least one credit card with a credit line exceeding $10,000, or that each has a loan from a finance company, or that each has recently opened a line of credit. Some lists also provide information about consumers' individual income. Thus, the target-marketing lists effectively communicate information of the kind that is used by credit grantors in determining whether to advance credit to an individual. See C.A. App. A0468-A0494, A0750-A0767.

Petitioner has a highly advantageous position among list providers because, as a consumer reporting agency, it has access to extensive, detailed, and up-to-date credit information about consumers. See C.A. App. A0738. By contrast, petitioner's competitors in the target-marketing list business that are not consumer reporting agencies must rely on less comprehensive sources of information about consumers, such as public record information and self-reported information from consumers. See *id.* at A0745-A0747, A0777-A0780.

As a consumer reporting agency, petitioner is regulated by the Fair Credit Reporting Act (FCRA or Act), 15 U.S.C. 1681 *et seq.* Congress enacted the FCRA in 1970 to address two salient problems: consumer reporting agencies' failure to maintain accurate consumer credit information, and their failure to protect the confidentiality of information in consumers' files. 15 U.S.C. 1681; see *TRW, Inc.* v. *Andrews*, 122 S. Ct. 441, 444 (2001).

The FCRA addresses the first problem by requiring consumer reporting agencies to implement reasonable procedures to assure the accuracy of reports, and by allowing consumers to obtain copies of their reports and to dispute inaccurate information. 15 U.S.C. 1681e, 1681g, 1681i, 1681m (1994 & Supp. V 1999).

The FCRA addresses the second concern by restricting the dissemination of consumer reports to those who have a statutorily-defined permissible purpose for receiving such reports (or when the consumer affirmatively consents to disclosure). 15 U.S.C. 1681b(a) (Supp. V 1999). A credit grantor evaluating a consumer's application for credit has a permissible purpose for receiving a consumer report, as does an insurer considering an insurance application, and an employer evaluating an employment application.[2] See 15 U.S.C. 1681b(a)(3)(A)-(C) (Supp. V 1999). Another permissible purpose under the FCRA is "prescreening," the process whereby grantors of credit and insurance obtain (from a consumer reporting agency, such as petitioner) a list of consumers who meet certain criteria in order to make firm (but unsolicited) offers of credit or insurance to those consumers. 15 U.S.C. 1681b(c)(1)(B) (Supp. V 1999).

Target marketing, however—solicitation informed by the marketer's awareness of potential customers' individual credit characteristics—is not a permissible purpose under the FCRA. Indeed, petitioner's target-marketing business would allow its list purchasers to use the information on the lists for essentially unlimited

[2] The FCRA also authorizes consumer reporting agencies to disseminate reports in response to court orders, or in connection with the enforcement of child support awards. 15 U.S.C. 1681b(a)(1) and (4) (Supp. V 1999).



solicitation purposes, including sending consumers unsolicited catalogues, advertising, sweepstakes entries, and requests for donations.[3] Because these are not permissible purposes for consumer reports under the FCRA, a consumer reporting agency violates the FCRA if it sells a consumer report to someone who intends to use that report for target marketing, without the permission of each listed individual. A consumer reporting agency may, however, sell a consumer report for target marketing if each listed consumer affirmatively consents. 15 U.S.C. 1681b(a)(2) (Supp. V 1999).

2. In 1992, the FTC filed an administrative complaint against petitioner alleging that petitioner's target-marketing lists were "consumer report[s]," as that term is defined in the FCRA, 15 U.S.C. 1681a(d) (1994 & Supp. V 1999), and that petitioner violated the FCRA by selling those lists to businesses that lacked a

[3] The Commission's decision in this case gives examples of how petitioner's customers used the target-marketing lists. See C.A. App. A0742-A0743. One customer used the information from petitioner's lists "to advance its telemarketing promotion which offered homeowners who had been denied credit elsewhere the opportunity to reduce their monthly mortgage rates by refinancing their mortgage, thereby freeing up funds for 'home improvements,' a 'new car,' or a 'dream vacation.'" *Id.* at A0742. Petitioner observes (Pet. 2) that some of its customers purchased lists in order to solicit political or charitable donations from individuals with financial characteristics. Nothing in the record, however, establishes whether purchases of petitioner's lists for such political or charitable purposes constituted anything more than a minor portion of petitioner's target-marketing business. In any event, it is undisputed that petitioner's target-marketing business was not *limited* to providing consumer credit reports for political and charitable purposes, but rather provided those reports for an essentially unlimited range of uses, including (as the Commission made clear by its examples) purely commercial solicitation.

permissible purpose under the FCRA for receiving a consumer report. In 1994, the FTC entered an order against petitioner on a motion for summary decision. *In re Trans Union Corp.*, 118 F.T.C. 821. The FTC ruled that petitioner's target-marketing lists constituted a series of consumer reports regarding every listed consumer, and that petitioner's sale of those lists was not for a permissible purpose under the FCRA. *Id.* at 870, 878-879.

3. On petition for review, the court of appeals reversed and remanded to the FTC. *Trans Union Corp.* v. *FTC*, 81 F.3d 228 (D.C. Cir. 1996). Although the court agreed with the FTC that target marketers do not have a permissible purpose for receiving consumer reports, see *id.* at 234, it was unable to conclude on the record before it that petitioner's target-marketing lists constituted consumer reports. In particular, the court found a genuine issue of fact as to whether target-marketing lists communicate information of the kind used by creditors as a factor in making decisions to grant credit, one of the three elements of the FCRA's statutory definition of "consumer report." See *id.* at 231-233; 15 U.S.C. 1681a(d) (1994 & Supp. V 1999). The court ruled that, if the FTC wished to pursue the matter, it would have to develop a record sufficient to establish the final element of the definition. See 81 F.3d at 233.

4. On remand, a trial was held before an ALJ, at which evidence was presented showing that petitioner's target-marketing lists communicate information of the kind used by credit grantors to determine whether individuals should be advanced credit. Based on that evidence, the ALJ concluded that petitioner's target-marketing lists are "consumer reports" under the FCRA, and that petitioner's sale of those lists for



target-marketing purposes violates the Act. C.A. App. A0558-A0559. The ALJ ordered petitioner to cease and desist distributing consumer reports in the form of target-marketing lists unless petitioner has reason to believe that the recipient of the list will use the list for a statutorily authorized purpose. *Id.* at A0560.

The Commission substantially adopted the ALJ's decision and order. C.A. App. A0731-A0789. The Commission upheld the ALJ's central factual determination, based on the evidence at trial, that target-marketing lists contain information of the kind used by creditors to decide whether to advance credit to individuals. *Id.* at A0767. The Commission noted that, in fact, "the record shows that [petitioner] *expected* its credit grantor customers to *use* the information as factors in such determinations." *Id.* at A0752.

Addressing petitioner's constitutional arguments, the Commission acknowledged that consumer reports "do possess a quality of speech," C.A. App. A0769, but it emphasized that target-marketing lists "concern private information about individual consumers' credit history and other confidential, personal financial data," *id.* at A0768-A0769. The Commission also likened the reports to commercial speech because, although the reports are not themselves advertisements, they are "antecedent to advertisements—*i.e.*, the solicitations that [petitioner's] target marketing customers send to the consumers identified in the target marketing lists." *Id.* at A0770. The Commission upheld that application of the FCRA to target-marketing lists under intermediate scrutiny because, it concluded, the government has a substantial interest in protecting the privacy of individuals' personal financial information communicated by the reports, see *id.* at A0771-A0775, unauthorized disclosure itself causes the harm to the important,

statutorily protected privacy interest, see *id.* at A0775-A0776, and Congress's decision to require affirmative consumer consent rather than an "opt-out" system to protect privacy was reasonable, see *id.* at A0785-A0786.

5. Trans Union again petitioned for review, and the court of appeals affirmed. Pet. App. 1a-15a. Based on the record compiled before the FTC, the court sustained the Commission's determination that target-marketing lists are "consumer reports" under the FCRA because they contain information of the kind used as a factor in establishing the consumer's eligibility for credit, and thus also upheld the FTC's conclusion that the dissemination of such lists for purposes other than those allowed under the statute violates the FCRA. See *id.* at 7a-10a.

The court also rejected petitioner's contention that the application of the FCRA to target-marketing lists violates the First Amendment. Pet. App. 13a-15a. Drawing an analogy to the credit report at issue in *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), which received only "reduced constitutional protection" because it addressed "no public issue," Pet. App. 13a, the court applied an intermediate level of constitutional scrutiny to the application of the FCRA to petitioner's target-marketing lists. The court ruled that the interest furthered by the FCRA, protecting the privacy of consumer credit information, is substantial, see *id.* at 13a-14a, that Congress was not obliged to choose the least restrictive means to further that interest (such as an "opt-out" mechanism), *id.* at 14a, and that the FCRA is not underinclusive, *id.* at 14a-15a.

6. On petition for rehearing, the court of appeals reaffirmed its ruling that the application of the FCRA



to target-marketing lists is constitutional. Pet. App. 16a-23a.

The court again found support for its application of intermediate scrutiny in *Dun & Bradstreet*. The court observed that the lists at issue in this case, like those in *Dun & Bradstreet*, "interest only [petitioner] and its target marketing customers," and that petitioner restricted the purchasers of its target-marketing lists from disseminating the data on those lists further, just as Dun & Bradstreet restricted its subscribers from further disseminating the credit reports at issue in that case. See Pet. App. 16a-17a. The court also noted that, whereas *Dun & Bradstreet* concerned financial information about corporations, which often make their financial statements available for public inspection, target-marketing lists contain nonpublic information about individuals' financial circumstances. *Id.* at 17a. The court found this case to be unlike cases in which this Court has struck down restrictions on the publication of truthful information, for those cases all involved "speech on matters of public concern." *Ibid.* And it rejected petitioner's argument that the FCRA makes a content-based distinction requiring strict scrutiny, noting that the commercial speech doctrine itself "creates a category of speech defined by content but afforded only qualified protection." *Id.* at 19a.

The court also reaffirmed its conclusion that the FCRA satisfies intermediate scrutiny. As the court observed, given that the substantial interest protected by the FCRA is the individual's interest in maintaining the privacy of personal financial information, "the government cannot promote its interest * * * except by regulating speech because the speech itself (dissemination of financial data) causes the very harm the government seeks to prevent." Pet. App. 19a. "[H]ere,"

the court observed, "there is no possibility that some less-restrictive or nonspeech-related regulation could achieve the identified state interest." *Id.* at 19a-20a. Nor, the court reiterated, is the FCRA underinclusive merely because it permits similar information to be disseminated to entities that intend to make firm offers of credit and insurance to consumers. The court noted that individuals often fiercely protect the privacy of information in some circumstances but willingly provide the same information in other circumstances, and that Congress may well have concluded that individuals "are more willing to reveal personal information in return for guaranteed offers of credit than for catalogs and sales pitches." *Id.* at 21a-22a. That permissible use of consumer reports is also justified, the court explained, because "the FCRA's express purpose is to facilitate credit." *Id.* at 22a. Finally, the court concluded, under intermediate scrutiny "neither a perfect nor even the best available fit between means and ends is required." *Ibid.*

## ARGUMENT

The decision of the court of appeals, upholding the constitutionality of the application of the FCRA to the sale of target-marketing lists, does not conflict with any decision of this Court or any other court of appeals. The court's decision to apply a reduced level of First Amendment scrutiny to petitioner's sales of its target-marketing lists is in accord with the established principle that speech that is solely in the financial interest of the speaker and a discrete and limited audience, and that does not touch on issues of broader public concern, is less central to the values protected by the First Amendment and is thus entitled to a lesser degree of constitutional protection. Nor does the court of



appeals' application of that intermediate standard of review to the facts of this particular case warrant further review. Accordingly, this Court's review is not warranted.

1. Petitioner's principal contention (Pet. 17-25) is that the court of appeals erred in applying an intermediate level of review, rather than strict scrutiny, to the FCRA. The court of appeals' decision to apply intermediate scrutiny, however, is fully consistent with this Court's decisions and with other appellate decisions.

a. This case involves the sale of individuals' personal, nonpublic financial information to entities that wish to use that information to make solicitations in their own financial interest. The lists have no accompanying commentary from the speaker (petitioner) that links the personal information to any issue of broad public concern. But the generation of the lists necessarily does disclose personal consumer credit information —including information about individuals' credit history, loans from finance companies, and bank cards— that Congress has determined to be deserving of protection from indiscriminate dissemination. See 15 U.S.C. 1681(a)(4) (congressional finding that "[t]here is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy"). Whether or not the information imparted by target-marketing lists might be "embarrassing" as a categorical matter (see Pet. 13), it is personal information that, traditionally, has not been made a matter of public record but has been subject only to limited dissemination by individuals and their creditors.

Given the personal and nonpublic nature of the information reflected on the target-marketing lists, and

the circumscribed audience to which petitioner seeks to disseminate that information (see Pet. App. 16a-17a), the court of appeals correctly determined that petitioner's commercial use of that information is entitled only to a reduced level of constitutional protection, essentially the level of intermediate scrutiny applied in this Court's commercial speech decisions. See *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 561 (1980). Although petitioner's target-marketing lists do not themselves propose a commercial transaction—perhaps the classic example of commercial speech, see *Bolger* v. *Youngs Drug Prods.*, 463 U.S. 60, 66 (1983)—they are used by many of petitioner's customers for the purpose of making their own commercial solicitations. See note 3, *supra*. Thus, the sale of the information on petitioner's target-marketing lists is effectively a precursor to the classic kind of commercial speech that receives only a reduced level of constitutional protection. Petitioner's speech "can be reduced to, I [petitioner] will sell you [subscriber] the X [names and addresses of individuals] at the Y price." *United Reporting Publ'g Corp.* v. *California Highway Patrol*, 146 F.3d 1133, 1137 (9th Cir. 1998), rev'd on other grounds, 528 U.S. 32 (1999).

The court of appeals' ruling that a reduced level of constitutional scrutiny governs the application of the FCRA to target-marketing lists is consistent with the few decisions of other courts of appeals that have addressed similar commercial sales of lists of names and addresses, and have concluded that such transactions are properly analyzed under the commercial speech doctrine.[4] For example, in *United Reporting Publishing*, *supra*, the Ninth Circuit concluded that the plaintiff's desired sale of names and addresses of arrestees to customers who would use those lists for solicitation purposes was a "pure economic transaction * * * comfortably within the core notion of commercial speech." 146 F.3d at 1137 (internal quotation marks omitted). Similarly, in *US West, Inc.* v. *FCC*, 182 F.3d 1224 (1999), cert. denied, 530 U.S. 1213 (2000), the Tenth Circuit, in examining an FCC regulation that restricted telecommunications carriers from disseminating, within the carrier, information about customers' telecommunications services, applied the well-settled *Central Hudson* commercial speech test. The court noted that, "when the sole purpose of the intra-carrier speech based on [customer information] is to facilitate the marketing of telecommunications services to individual customers, we find the speech integral to and inseparable from the ultimate commercial solicitation." *Id.* at 1233 n.4. Here as well, the sale of target-marketing lists to petitioner's list purchasers is integral to and inseparable from the commercial solicitations for which

[4] Petitioner maintains (Pet. 24) that, in *Equifax Services, Inc.* v. *Cohen*, 420 A.2d 189 (Me. 1980), cert. denied, 450 U.S. 916 (1981), the Supreme Judicial Court of Maine invalidated part of Maine's analogue to the FCRA on the ground that the state statute was a "direct content-based restraint on speech" and not a content-neutral time, place, and manner restriction. But we have not argued, and the court of appeals did not rule, that the application of the FCRA should receive reduced constitutional scrutiny because it is a content-neutral time, place, and manner restriction. Indeed, the category of "commercial speech" is inherently content-based, and yet (as the court of appeals observed, Pet. App. 19a), this Court has consistently held that regulations of commercial speech are subject to a reduced level of constitutional scrutiny. Thus, in *Equifax*, the Maine court assumed that the statute at issue should be analyzed as a regulation of commercial speech, see 420 A.2d at 195, and it applied the *Central Hudson* test governing regulations of commercial speech, see *id.* at 197-198.

those list purchasers intend to use the lists,[5] and therefore is properly analyzed under the test applicable to commercial speech, which provides a reduced level of constitutional immunity from regulation.[6]

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[5] As we have noted (see note 3, *supra*), petitioner points to some instances in which its customers purchased, or wished to purchase, target-marketing lists in order to solicit political or charitable donations. Petitioner has not claimed, however, that its target-marketing business was limited to sales for those purposes, nor did it seek authorization in these proceedings to market lists whose use would be limited solely to those purposes. Accordingly, the conduct at issue in this case is petitioner's sale of lists for essentially unrestricted use in target marketing.

[6] Petitioner argues (Pet. 24) that the decision of the court of appeals conflicts with the decision of the California Court of Appeal, Second District, in *U.D. Registry, Inc.* v. *State*, 40 Cal. Rptr. 2d 228 (1995), review denied, No. B077282 (Cal. Aug. 17, 1995), cert. denied, 516 U.S. 1074 (1996). In *U.D. Registry*, the state court concluded that lists of consumers involved in unlawful detainer actions, which were sold by U.D. Registry, constituted fully protected speech. The court reached that conclusion, however, only because it incorrectly concluded that the only commercial speech that receives reduced First Amendment protection is speech specifically proposing a commercial transaction. *Id.* at 230.

In any event, a conflict with an intermediate state appellate court does not ordinarily warrant this Court's review on certiorari, see Sup. Ct. R. 10(a), because the state supreme court may eventually examine the issue and resolve the conflict without the need for this Court's intervention. Thus, it is at least premature to assert, as petitioner does (Pet. 16, 25), that the California state courts would not apply commercial-speech analysis in civil actions alleging that petitioner disseminated personal information in violation of the FCRA. Should the California Supreme Court (or another California court of appeal) eventually be presented with issues similar to those presented in this case, it might well follow the more recent decisions of three federal appellate courts that we have just discussed (including a decision of the Ninth Circuit) to the effect that the sale of lists of names and addresses and other personal information to customers who intend to use that information for solicitation purposes is properly analyzed under the test applicable to commercial speech.



b. The court of appeals also drew support from *Dun & Bradstreet, Inc.* v. *Greenmoss Builders*, 472 U.S. 749 (1985), for application of a reduced level of constitutional scrutiny. In *Dun & Bradstreet*, a construction contractor brought a defamation action seeking punitive damages against a consumer reporting agency that had issued a false consumer report to the contractor's creditors. Previously, in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court had held that, absent a showing of actual malice, the First Amendment prohibits an award of punitive damages to a private individual for a defamatory statement that involves a matter of public concern. In *Dun & Bradstreet*, the Court declined to extend the malice requirement of *Gertz* to defamatory statements that do not implicate a matter of public concern. See 472 U.S. at 758-759 (opinion of Powell, J.) (stressing that "not all speech is of equal First Amendment importance," and that it is "speech on matters of public concern that is at the heart of the First Amendment's protection") (citations and internal quotation marks omitted); *id.* at 764 (Burger, C.J., concurring in the judgment) (distinguishing *Gertz* as "limited to circumstances in which the alleged defamatory expression concerns a matter of general public importance"); *id.* at 774 (White, J., concurring in the judgment) (declining to apply *Gertz* because "the defamatory publication in this case does not deal with a matter of public importance").[7]

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[7] Petitioner (Pet. 17-18), joined by some of its amici (Coalition for Sensible Public Records Access Br. 5-6; Washington Legal Foundation Br. 19-20) attempts to reinterpret *Dun & Bradstreet* by arguing that the crucial factor in that case was not that the

The court of appeals in this case stressed that, here as in *Dun & Bradstreet*, the speech at issue does not address any matter of public concern, and so does not implicate core First Amendment values of vigorous discussion of public issues. Petitioner argues that *Dun & Bradstreet*'s distinction between matters of public concern and purely private speech should not be extended to the area of privacy protection. See Pet. 20-21. But this Court's most recent decision examining the balance between the important interest in protecting personal privacy and First Amendment values

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speech did not address a matter of public concern, but rather that it was false. But of course, every defamation case involves speech that is at least alleged to be false; what distinguished the false and defamatory credit report at issue in *Dun & Bradstreet* from the false and defamatory statements at issue in other cases (such as *Gertz*) that received more stringent constitutional protection was the fact that the credit report in *Dun & Bradstreet* did not address a matter of public concern. See *Dun & Bradstreet*, 472 U.S. at 760 (opinion of Powell, J.) ("In *Gertz*, we found that the state interest in awarding presumed and punitive damages was not 'substantial' in view of their effect on speech at the core of First Amendment concern. This interest, however, *is* 'substantial' relative to the incidental effect these remedies may have on speech of significantly less constitutional interest.") (citation omitted).

There is also no merit to petitioner's suggestion (Pet. 18) that its lists are somehow entitled to more First Amendment protection than the credit report in *Dun & Bradstreet* because its lists include information regarding "thousands (or more) of potential consumers," whereas the *Dun & Bradstreet* report contained information regarding only one company. What is important is not the length of petitioner's lists but the fact that the information about each person on the lists is generally considered private, and that—as in *Dun & Bradstreet*—the information does not address issues of public import and is disseminated only to a restricted audience. Pet. App. 16a; compare *Dun & Bradstreet*, 472 U.S. at 762 (opinion of Powell, J.).



demonstrates that whether the information at issue turns on a matter of public concern is often fundamental to answering the constitutional question whether public dissemination of that information may be regulated.

In *Bartnicki* v. *Vopper*, 532 U.S. 514 (2001), the Court addressed a constitutional challenge to the application of 18 U.S.C. 2511(1)(c), which prohibits any person who, knowing or having reason to know that an electronic communication was illegally intercepted, discloses the content of that communication. The case involved the dissemination of a taped conversation (which had been unlawfully intercepted) between officials of a public school teachers' union discussing tactics in collective bargaining negotiations with the school board. The Court accepted that Section 2511(1)(c) promotes "[p]rivacy of communication," an "important interest." 532 U.S. at 532. But the Court found the application of Section 2511(1)(c) to the facts of the case to be unconstitutional *because* the taped conversation involved matters of public concern: "The enforcement of that provision in these cases, however, implicates the core purposes of the First Amendment *because* it imposes sanctions on the publication of truthful information *of public concern*." *Id.* at 533-534 (emphasis added); see also *id.* at 535 ("[A] stranger's illegal conduct does not suffice to remove the First Amendment shield from speech *about a matter of public concern*.") (emphasis added); *id.* at 535-536 (Breyer, J., concurring) (emphasizing that "the information publicized involved a matter of unusual public concern"); *id.* at 540 (observing that "the subject matter of the conversation at issue here is far removed from that in situations where the media publicizes truly private matters").

Petitioner invokes (Pet. 19) the so-called *Daily Mail* principle for the proposition that the government may

not prohibit the publication of lawfully obtained information. The Court in *Bartnicki* explained quite clearly, however, that the *Daily Mail* line of cases stands for the proposition that, "if a newspaper lawfully obtains truthful information *about a matter of public significance* then state officials may not constitutionally punish publication of the information, absent a need * * * of the highest order." 532 U.S. at 527-528 (quoting *Smith* v. *Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979)) (emphasis added); see also *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 839 (1978) (invalidating a prohibition against publication of non-public proceedings of a state judicial review commission, a matter "of utmost public concern"). Thus, *Daily Mail* and its progeny simply do not control a case like this one, in which the substance of the disseminated information is not of general interest to the public.[8]

Contrary to petitioner's contention (Pet. 19-20), the decision below does not establish an inflexible rule that invariably elevates privacy in matters lacking public

[8] *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982), is similarly inapposite in this context. In that case, the Court recognized the "strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association," *id.* at 912, but held that the government's authority to regulate economic activity "could not justify a complete prohibition against a nonviolent, *politically motivated* boycott," *id.* at 914 (emphasis added). Thus, the Court ruled that the state could not constitutionally prohibit participants in the boycott from publishing the names of boycott violators. In that case, however, the speech at issue—the names of boycott violators—imparted information central to a political controversy to a public audience. By contrast, petitioner's target marketing lists reveal no information that is itself of political significance or otherwise of public concern, and are not addressed to the public at large.



concern over the First Amendment value of free speech. To the contrary, the intermediate level of scrutiny applicable to the regulation of commercial speech is highly context-sensitive, and the government must show that such a regulation is narrowly tailored and directly promotes a substantial governmental interest. See *Central Hudson*, 447 U.S. at 566. It is petitioner's submission that is sweeping and categorical, for it would place on the government the onerous burden of satisfying strict scrutiny in virtually every regulatory effort to protect privacy in personal information. No decision of this Court designates personal privacy as so minor a factor in the constitutional calculus.[9]

Moreover, petitioner's contentions concerning sales of its target-marketing lists must be considered in the

[9] There is no basis for petitioner's alarmist assertion that the court of appeals' narrowly focused decision has the potential to "strip[]" speakers of their First Amendment rights (Pet. 23). The court of appeals' analysis of this case turned on the particular nature of the information at issue, which traditionally has not been subject to public dissemination, as well as the purposes to which that information is put when petitioner sells target-marketing lists. It does not follow that newspapers could be prohibited from reporting home sales (since such sales are often placed by local governments on the public record in land records offices) or the fact that an individual worked for a particular employer (since there is a much greater likelihood that that information would have already found its way into the public domain). The application of any privacy-protection measure broader than that in the FCRA would, of course, turn on a fact-sensitive application of the constitutional standards to the particular speech at issue in the case. *This* case, however, involves information that is intensely personal in nature, that generally is not disclosed to the public, that does not address issues of broad public concern, and that is disseminated by petitioner only to a discrete and limited audience.

context of the FCRA's overall regulatory scheme, which governs an aspect of the economy, consumer reporting, that has long been subject to government regulation. The FCRA restricts who may receive copies of consumer reports and sets forth procedures whereby consumers may obtain copies of their reports, 15 U.S.C. 1681g (1994 & Supp. V 1999); sets the charges for such copies, 15 U.S.C. 1681j (1994 & Supp. V 1999); creates a procedure whereby a consumer may dispute the accuracy of a report, 15 U.S.C. 1681i (1994 & Supp. V 1999); and establishes the responsibilities of those who furnish information to consumer reporting agencies, 15 U.S.C. 1681s-2 (Supp. V 1999). Petitioner is apparently of the view that all of these regulations must be subject to strict scrutiny because they all bear on the consumer reporting agency's ability to engage in speech. But this Court has long held that, in light of the government's substantial interest in regulating commercial arrangements for the benefit of the individual consumer (here, the creation, accuracy, and sale of consumer reports), the government may also regulate the speech that is an incident of that arrangement, subject to a reduced level of First Amendment protection. See *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978); *Edenfield* v. *Fane*, 507 U.S. 761, 767 (1993); see also *SEC* v. *Wall Street Publ'g Inst., Inc.*, 851 F.2d 365, 373 (D.C. Cir. 1988) (noting that, when the government extensively regulates a field of economic activity, its power to regulate the communications of affected businesses "is at least as broad as with respect to the general rubric of commercial speech"), cert. denied, 489 U.S. 1066 (1989).

2. Under the settled constitutional test governing commercial speech, a regulation of commercial speech will be upheld when the government interest served by



the regulation is substantial, the regulation directly advances that governmental interest, and the restriction is not more extensive than reasonably necessary to accomplish the interest. *Central Hudson*, 447 U.S. at 566. Under a proper application of that test, the FCRA's application to target-marketing lists is constitutional.

a. First, the court of appeals correctly held that the government's asserted interest, "protecting the privacy of consumer credit information—is substantial." Pet. App. 14a. Without directly asserting that the protection of privacy is *not* a substantial governmental interest, petitioner expresses skepticism about the wisdom of regulations intended to protect privacy. See Pet. 13-14.

This Court has recognized, however, that protection of privacy is a substantial government interest. See *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 625 (1995). The Court has also explained, in contexts other than First Amendment claims, that the essence of an individual's personal privacy is "control of information concerning his or her person," *Department of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 (1989), and that individuals have, in at least some contexts, a substantial privacy interest even in their names and addresses, especially since disclosure of names and addresses can subject individuals to "commercial advertisers and solicitors." *United States Dep't of Defense* v. *FLRA*, 510 U.S. 487, 501 (1994); see *United States Dep't of State* v. *Ray*, 502 U.S. 164, 175 (1991) (noting that individuals have a privacy interest in "highly personal information regarding * * * employment status [and] * * * living conditions"). An individual's privacy interest (and, concomitantly, the government's interest in protecting that privacy) is

even greater where (as here) release of the name is equivalent to release of personal, nonpublic financial information about the individual.

b. The court of appeals further ruled that the FCRA's application to target-marketing lists "unquestionably advances the identified state interest" in protecting consumer privacy. Pet. App. 19a. As the court explained, "the government cannot promote its interest [in protecting consumers from unwarranted disclosure of their private information] except by regulating speech because the speech itself (dissemination of financial data) causes the very harm the government seeks to prevent." *Ibid.* No speculation or conjecture is necessary to reach that conclusion; rather, the judgment is based on "simple common sense" (*Went For It*, 515 U.S. at 628).

Petitioner argues that the FCRA's protection of privacy is underinclusive because the Act does not prohibit "prescreening"—*i.e.*, the disclosure of consumer reports (including individuals' names and addresses, under circumstances that reveal credit information about those individuals) to companies that intend to use that information to extend firm offers of credit or insurance to individuals that meet their credit-related eligibility criteria. Petitioner suggests that, because Congress in 1996 permitted the disclosure of consumers' names and addresses for the narrow purpose of facilitating firm offers of credit and insurance, the statutory restrictions against disclosures of consumers' names and addresses for other purposes, including target marketing, must fail. See Pet. 25-28.

Petitioner's underinclusiveness argument fails to acknowledge, however, that individuals may have a substantial privacy interest in avoiding the dissemination of their personal information even when that



information is not otherwise maintained in complete secrecy. As this Court explained in *Reporters Committee*, "the fact that 'an event is not wholly "private" does not mean that an individual has no interest in limiting disclosure or dissemination of the information.'" 489 U.S. at 770 (quoting Rehnquist, *Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?*, *Nelson Timothy Stephens Lectures*, Univ. of Kansas Law School, pt. 1, p. 13 (Sept. 26-27, 1974)). Thus, even though the FCRA does permit consumer reporting agencies to provide consumer reports, including reports containing the information at issue in this case, for a few narrow purposes, it does not follow that individuals do not have a substantial privacy interest in ensuring that the same information is not disseminated for other purposes.

Petitioner's argument also rests on an incomplete account of the statutory provision that permits, under limited circumstances, disclosure of consumer reports for prescreening. It must first be understood that the FCRA has always permitted consumer reporting agencies to furnish consumer reports for certain specific and limited purposes. Congress has recognized that credit-related information in consumer reports is highly useful to facilitate consumers' access to important financial services, especially credit and insurance. On that basis, Congress has concluded that the benefit to consumers in facilitating access to credit and insurance is sufficiently important to outweigh the particular infringement on privacy caused by dissemination of credit-related information in consumer reports to credit grantors and insurance underwriters. See 15 U.S.C. 1681b(3)(A) and (C) (1970); 15 U.S.C. 1681b(a)(3)(A) and (C) (Supp. V 1999). Congress's privacy-protection objective in the FCRA was not to squelch all circulation of

consumer credit information, but rather to ensure that that sensitive information is used only for those purposes to which consumer credit information is closely related.

The FTC interpreted the FCRA to permit consumer reporting agencies to furnish consumer reports for the purpose of prescreening for firm offers of credit long before Congress codified that understanding into law in 1996. As the FTC explained in 1973 (when it first expressed that understanding) and again in 1990 (when it reexamined the issue), the FCRA specifically permits a consumer reporting agency to furnish a consumer report to anyone who "intends to use the information in connection with a credit transaction involving the consumer," 15 U.S.C. 1681b(3)(A) (1970).[10] As the FTC explained, businesses that use prescreened lists to extend firm offers of credit to consumers fall within the scope of that statutorily permissible purpose because they intend to use the information to enter into a credit transaction with the consumer, if the consumer accepts the firm offer of credit. See 55 Fed. Reg. 18,807 (1990); 38 Fed. Reg. 4947 (1973).

When Congress codified the permissible use of consumer reports for prescreening for credit and insurance in 1996, it *restricted* that use to some degree. Congress limited the consumer information that may be placed on prescreened lists and also required consumer reporting agencies to maintain an opt-out system whereby consumers can prevent use of their personal information

[10] Similarly, the FCRA has always permitted a consumer reporting agency to furnish a consumer report to one who "intends to use the information in connection with the underwriting of insurance involving the consumer." 15 U.S.C. 1681b(a)(3)(C) (Supp. V 1999); 15 U.S.C. 1681b(3)(C) (1970).



for prescreening. See 15 U.S.C. 1681b(c) (Supp. V 1999). At the same time, Congress did not amend the FCRA to expand the permissible disclosure of personal credit information for general solicitation purposes. Congress's decision not to allow a broader use of personal credit information for target marketing reflects its sensible judgment, reached previously by the FTC, that disclosure of the sensitive consumer credit information that credit bureaus compile (see 15 U.S.C. 1681a(f)) should be limited to those specific and narrow purposes where (Congress concluded) the consumer's interest in improved access to financial services outweighs the infringement on personal privacy caused by that limited dissemination of personal financial information.

There is therefore no merit to petitioner's assertion (Pet. 27) that the FCRA's restrictions on the disclosure of consumer credit information are so pierced by "exemptions and inconsistencies" that they fail to advance the statutory purpose of protecting personal privacy in financial information. Cf. *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 489 (1995). The permissible purposes for disclosure of consumer credit information in the FCRA (including prescreening) are simply part of one of the overarching objectives of the FCRA—to improve the quality of the process by which consumers obtain credit and insurance, by ensuring that credit grantors and insurance underwriters obtain the accurate information that they need to make an informed decision whether to grant credit or to provide insurance to a particular individual.[11] But disclosure of consumer credit informa-

[11] See 115 Cong. Rec. 33,408 (1969) (statement of Sen. Proxmire) ("The bill recognizes the vital role played by credit reporting agencies in our economy. Those who extend credit or insurance or

tion for target-marketing purposes would result in a much broader dissemination of individuals' personal financial information, far beyond the limited spheres of credit and insurance that are at the core of the FCRA.

Congress has concluded that the benefits that consumers obtain from credit and insurance transactions make acceptable the limited infringement on consumers' privacy that results from disclosure of credit-related information to facilitate those transactions, but it has concluded that the balance does not tip the same way with respect to general solicitation. Petitioner would strike the balance differently, but its disagreement with Congress's judgment does not render the FCRA unconstitutional. See *United States* v. *Edge Broadcasting Co.*, 509 U.S. 418, 434 (1993) ("Within the bounds of the general protection provided by the Constitution to commercial speech, we allow room for legislative judgments.").

c. Finally, petitioner argues that the FCRA is not narrowly tailored because, it asserts, Congress should have adopted an "opt-out" approach allowing disclosure of consumer credit information unless the consumer specifically objects, rather than requiring affirmative consumer permission for disclosure (except for the specific statutorily permissible purposes). Petitioner argues that an opt-out mechanism would be an equally effective means to protect consumer privacy that would be less intrusive on its speech interests. See Pet. 9, 26 & n.15.

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who offer employment have a right to the facts they need to make sound decisions."); *id.* at 33,412 (statement of Sen. Williams) ("No one disagrees with the premise that those who extend credit have a right to the facts needed in order to make sound decisions.").



It is scarcely obvious, however, that an opt-out approach requiring consumers to *object* to dissemination of their personal information is as effective a means to protect personal privacy as is an opt-in approach requiring affirmative consumer consent before information may be disclosed. The effectiveness of any opt-out approach to protect personal privacy depends crucially on the way in which individuals are provided notice of their entitlement to opt out and the ease with which they may make their preferences known. Moreover, the problem with any opt-out approach is that individuals may not fully appreciate the significance of what they are being asked to do: they may not pay attention to mailings advising them of the right to opt out, or they may inadvertently fail to register their preference. By contrast, an opt-in approach requiring affirmative consent to disclosure guarantees that dissemination of personal information will be based on the individual's *informed* approval. Thus, a requirement of affirmative consumer approval for disclosure of information in a consumer report (for purposes other than those expressly made permissible by the statute) is, at a minimum, "reasonably well tailored" to the government's important interest in protecting consumer privacy in personal credit-related information. Cf. *Went For It*, 515 U.S. at 633.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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